

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MADELINE PETRIE)	
Claimant)	
VS.)	
)	Docket No. 248,296
HERRMAN'S EXCAVATING, INC.)	
Respondent)	
AND)	
)	
CINCINNATI INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appealed the December 30, 1999 preliminary hearing Order entered by Administrative Law Judge Brad E. Avery.

ISSUES

This is a claim for a July 26, 1999 accident. After conducting a preliminary hearing at which claimant and three other witnesses testified, Judge Avery found that claimant had sustained a work-related injury. But the Judge denied benefits on the basis that claimant failed to provide the respondent with notice of the accidental injury within 10 days of the accident and, likewise, failed to prove that just cause existed to excuse providing notice within that time frame.

Claimant contends that Judge Avery erred and argues that the respondent had actual knowledge of the accidental injury as the grader operator allegedly witnessed the incident. Further, claimant alleges that she reported the incident to Mr. Robert Smith, a supervisor, within 10 days of the incident; that she was misled into believing that she had only 24 hours to report an accidental injury to the company; that the company did not post the required notices pertaining to work-related accidents; and that she later reported the accidental injury to one of the company's owners within 75 days of its occurrence.

Conversely, the respondent and its insurance carrier contend the Order denying benefits should be affirmed. They argue that the grader operator was not a supervisor and, therefore, his knowledge is not imputed to the company. Further, they argue that claimant did not tell Mr. Smith that she injured herself lifting a rock at work. Rather, they argue that

claimant denied being injured at work when Mr. Smith asked her. The respondent and its insurance carrier also dispute claimant's testimony that she reported her accidental injury to John Sims, the person who became claimant's lead man when she was transferred from the street crew to the pipe/sewer crew.

Finally, the respondent and its insurance carrier contend Judge Avery erred by finding that claimant sustained an accident that arose out of and in the course of employment. They argue that claimant failed to prove that she injured her back at work because she initially reported to her medical providers that she injured herself at home and also initially told Mr. Smith that her condition was not related to her work.

The only issues before the Appeals Board on this appeal are:

1. Did claimant sustain personal injury by accident arising out of and in the course of her employment?
2. Did claimant provide the respondent with timely notice of the accidental injury?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the Appeals Board finds:

1. The preliminary hearing Order should be affirmed.
2. Ms. Petrie injured her upper back and right upper extremity on July 26, 1999, while working for Herrman's Excavating, Inc. The Appeals Board affirms the Judge's finding and conclusion that the accident arose out of and in the course of employment. Ms. Petrie's testimony is uncontroverted that the grader operator she was working with on the date of accident witnessed her accident.
3. Ms. Petrie testified that before she saw her chiropractor on July 30, 1999, she told her supervisor, Mr. Robert Smith, that she had injured herself at work lifting a rock. Mr. Smith denies that. Mr. Smith also testified, as did his wife Melva, that Ms. Petrie telephoned him on the Sunday following her visit to the chiropractor and specifically denied that she had injured herself at work. Considering the entire record, the Judge found that Ms. Petrie had failed to provide notice of the accidental injury within 10 days of its occurrence. The Appeals Board affirms that finding.
4. Ms. Petrie alleges that Mr. Smith told her she had only 24 hours to report a work-related injury and, therefore, she told several doctors when she first sought treatment that she injured herself at home. Mr. Smith denies that conversation. Ms. Petrie further alleges that she again reported the accidental injury to the company after consulting with an attorney and learning that the 24-hour reporting rule was not Kansas law. She then began telling her doctors that she had injured herself at work.

5. The outcome of this claim hinges upon Ms. Petrie's credibility. At the preliminary hearing, Judge Avery observed Ms. Petrie, Robert Smith, John Sims, and Melva Smith testify. Based upon that personal observation, the Judge found that Ms. Petrie's testimony was not persuasive and that she had failed to prove that she notified Herrman's of the accidental injury within 10 days of its occurrence and that she had failed to prove that she had just cause for failing to report her work-related accidental injury within that 10-day period.¹ In this instance, the Appeals Board gives some deference to the Judge's impressions of credibility and affirms those findings.

6. Workers have the burden of proof to establish their rights to compensation.² And that burden is to persuade the trier of facts by a preponderance of the credible evidence that their position on an issue is more probably true than not when considering the whole record.³

7. Because Ms. Petrie has failed to prove that she provided timely notice of accidental injury, the request for benefits must be denied.

8. As provided by the Workers Compensation Act, preliminary hearing findings are not binding but subject to modification upon a full hearing of the claim.⁴

WHEREFORE, the Appeals Board affirms the December 30, 1999 preliminary hearing Order entered by Judge Avery.

IT IS SO ORDERED.

Dated this ____ day of February 2000.

BOARD MEMBER

c: Roger D. Fincher, Topeka, KS
Christopher J. McCurdy, Wichita, KS
Brad E. Avery, Administrative Law Judge

¹ See K.S.A. 44-520.

² K.S.A. 1999 Supp. 44-501(a).

³ K.S.A. 1999 Supp. 44-508(g).

⁴ K.S.A. 1999 Supp. 44-534a(a)(2).

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Philip S. Harness, Director